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IN THE

Supreme Court of the United States

October Term, 1963
No. 517

HARTLEY PEN COMPANY,
Petitioner,

vs.

THE HONORABLE WILLIAM C. MATHES, Judge of the United States District Court for the Southern District of California, Central Division, *et al.*,
Respondents.

HARTLEY PEN COMPANY,
Petitioner,

vs.

FORMULABS, INC., a California corporation, *et al.*,
Respondents.

Petitioner's Brief in Reply to Opposing Brief by Respondents Formulabs, Inc., Clarence Schreur, Gordon S. Lacy and Pacific Research Laboratory.

OWEN A. BARTLETT and
A. V. FALCONE,
416 West Eighth Street,
Los Angeles 14, California,
Attorneys for Petitioner Hartley Pen Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Preface.

A copy of said respondents' brief in opposition to petitioner's (hereinafter Hartley) petition for writ of certorari in the above proceeding was received by mail by Hartley's attorneys on October 30, 1963.

Hartley respectfully requests this Court's consideration of this reply brief under its Rule 24, paragraph 4.

Respondents' Brief.

Preface.

Respondents' brief does not comply with this Court's Rule 24, paragraph 1. It does *not* disclose "any matter or ground why the cause should not be reviewed" by this Court. It is not a "reply" brief. It does not deny, discuss or consider any of the factual or legal statements, contentions or authorities in the petition and does not cite any contrary authorities. Hartley's "Questions Presented" and its "Reasons for Granting the Writ" are unanswered.

The petition considered Cause 17799 and 18180. Respondents' brief is directed only to 18180. They have completely ignored 17799 and the Court of Appeals' refusal to decide it but to keep it "unsubmitted" although the determination thereof is a *condition precedent* to their right to intervene in any event, as they have vehemently argued *even to the extent of petitioning the Court of Appeals for rehearing on that ground and in that regard.*

Tactically, (intentional or not) respondents' brief tends to confuse Hartley's presentation to this Court of the grounds and reasons for its review, by certiorari, of this patently and concededly unprecedented case, which involves substantial constitutional rights, a complete change by the Court of Appeals in the historical concept and application of federal intervention (admittedly without precedent and obviously contrary to *all* decisions of this Court and the Courts of Appeals of other circuits on the fundamental principles involved), also a judicial expansion, or more properly, the creation of a new ground of federal jurisdiction, thereby creating an unlimited source of ever-increasing burdens of state court actions, incidentally and collaterally imposed upon the already saturated load on the federal district courts, as well as a serious undermining in the

significance and function of the F. R. C. P., particularly regarding intervention and discovery, including Rules 24, 30-36.

Respondents' brief also tends to distract this Court's attention from the *fact* that this case presents most serious and important issues and questions; which are not only critical to Hartley and respondents, but to *all* litigants, and which are *live*, *universally*, *presently* and *permanently* critically applicable.

Its statement of "Jurisdiction" is not such at all but a discussion of the history of this case including proceedings and documents in the District Court.

Its "Argument" does not consider or answer Hartley's "Questions Presented" or "Reasons for Granting the Writ." The small portion of it which may be considered discussion consists of obvious misstatements of the case and its issues.

Its 29 pages consist of more than 9 pages of *quotations* from parts of the decision of the Court of Appeals in 318 F. 2d 485 (which is *fully* set out in Appendix B to the petition, pages 10-41); about 3 pages of *quotations* from the Court of Appeals' decision in 275 F. 2d 52 (which is also *fully* set out in Appendix F to the petition, pages 46-55); about 6 pages of repetition of respondents' argument, *quoted verbatim*, to the District Court (which it rejected); about 3 pages on (including 1½ pages of quotations from) *Krippendorf v. Hyde*, 110 U. S. 276, *misapplied* by respondents and which supports petitioner's contentions (see Petition, p. 41). These total about 20 pages, leaving about 9 pages. Its 3 page statement on "Jurisdiction," as noted, is not such at all. This leaves about 6 pages. Of these 1½ pages are taken up with the "Opinions Below," ⅓ page with "The Question Presented" and "Statute and Rule Involved." This leaves about 4 pages in which respondents misstate the status of the case and the issues.

Its "Argument".

The substance of the "argument" appears to be:

1. That 275 F. 2d 52 declared "the law of the case", and was *res judicata*.

2. That respondents were entitled to due process.

3. That allegedly "There is no Conflict of Decisions" because in 275 F. 2d 52 (Pet. App. F, pp. 40-55) and in 318 F. 2d 485 (Pet. App. B., pp. 10-41) the Court of Appeals stated, in substance, that there was no "controlling decision" on the specific situation involved.

4. That intervention of right does not require diversity of citizenship or independent federal jurisdiction.

It cites no supporting authority and its statements consist of pontifical *ipse dixit*.

As to 1. 275 F. 2d 52 merely held that respondents had the right to intervene. It went no further. The Court explicitly did not pass upon the pleading or procedural sufficiency. It stated, referring to F. R. C. P. 27, "Section (c) of the Rule deals with procedure. Since no problem of procedure is involved, we will not quote the provisions of section (c)" (see Pet. App. F, p. 50, lines 14-16). This related to discovery proceedings incidental to the main action only. There was no trial or hearing on the merits and no final judgment or order was or could be involved. Accordingly, there was no "law of the case" and *res judicata* could not and did not apply.

In this regard respondents state that the same issues and contentions were involved in the proceedings which were the subject of both decisions. This is not so since after the first decision, as noted in the petition (see pp. 9-13), respondents initiated different proceedings, presented new pleadings, and were granted *limited*

leave to intervene only by joining Hartley in opposing du Pont's discovery proceedings which sought disclosure of the trade secret. Respondents accepted this leave and proceeded thereunder. The Court of Appeals in 318 F. 2d 485 acknowledged this when it said that respondent filed a new complaint "in purported accordance with permission given at the hearing held on July 31, 1961" (see Pet. App. B, p. 17, last line; p. 18, first line). That order became *final* by the *passage of time* and by the Court of Appeals' *dismisal of respondents' appeal therefrom in 17598 on December 4, 1961.* The intervenors, electing to accept that leave, are *bound* by it.

As to 2. Due process is merely the opportunity to be heard according to established proceedings in accordance with law. Respondents were not only given this opportunity repeatedly but were given rights and privileges not accorded any other litigant in the history of our recorded law, *i.e.*, to try a completely unrelated, independent state court action collaterally against only one party in the main federal action under the guise of "intervention."

It is Hartley who has not been accorded due process, as noted in the petition (see particularly pp. 6-7, 20).

As to 3. The statement that there is no conflict in the decisions is respondents' mere conclusion. They only make the statement and do not cite authorities or discuss those Hartley cited. The petition clearly shows clear-cut conflict with the decisions of this Court and the Courts of Appeals of other circuits.

Further, the fact that the decision of the Court of Appeals is one of first impression in its construction and application of the fundamental principles involved would be sufficient for granting certiorari.

It is true that the Court of Appeals in 275 F. 2d 52 stated that it did not find a "controlling decision" and that it repeated this, in substance, in 318 F. 2d 485. In the first decision it discussed several cases, cited by Hartley, including *Pure Oil Co. v. Ross* (7th Cir.), 170 F. 2d 651 and *Doody v. Hatfield* (D. C. Cir.), 189 F. 2d 637, cert. den. 342 U. S. 830, and stated they did not construe F. R. C. P. 24(a)(3). However, they (and other cases cited by Hartley) *explicitly did so* (see Pet. pp. 17-18).

As to 4. Respondents again misconstrue "intervention." Proper intervention of right may not require independent grounds of federal jurisdiction or diversity of citizenship. But this is because the main action is already properly within federal jurisdiction and because proper "intervention" is just that, *i.e.*, it comes within and becomes part of, as ancillary and incidental to, the main action. This is the exact opposite of what respondents want to litigate in the main action. As they have always militantly argued, their case is an independent case between them and Hartley only, unrelated to du Pont and to the issues and subject matter of the main action and not related to or affected by the judgment in the main action.

The law is established without *prior* conflict or discord that in order to authorize proper "intervention" (and this means the historically established and defined concept and application of intervention) the intervenor must have an interest in the *subject matter of the litigation*. This does not mean an interest in an incidental discovery or other collateral proceeding but in the very *crux* of the main action. Further, it is *not* every in-

terest in the *subject matter* that suffices, but a *very special kind of interest, i.e.*, "*of such a nature* that he will *gain or lose by the direct legal operation of the judgment.*"

Pure Oil Co. v. Ross, supra;
Dowdy v. Hatfield, supra;
Kelley v. Sommers (10th Cir.), 210 F. 2d 665;
Peckham v. Ronrico (1st Cir.), 211 F. 2d 727;
Sutphen Estates v. United States, 342 U. S. 19;
35-A C. J. S., Federal Civil Procedure, Sec. 135, pp. 216-217;
(And see Petition, pp. 17-18).

Among several misstatements, most of which are unworthy of comment, respondents state (p. 16) that Hartley's California state court action against respondents, which includes the same subject matter and issues respondents seek to litigate by their "intervention" in the main action, and which was filed on January 17, 1962, was allegedly filed four years "after intervention." This is not true. As noted in the petition, the Court of Appeals vacated a prior disclosure order (requiring Hartley to disclose to du Pont in the main action) in 287 F. 2d 324, decided on February 10, 1961. Du Pont then commenced new discovery proceedings which resulted in the new disclosure order (which is the subject of 17799) dated January 1, 1962. *Sixteen days* thereafter Hartley commenced the California state action (see Pet. pp. 10-13).

In their "Conclusions" (p. 29, second paragraph) respondents show their deliberate misstatement of the status of the case and issues. They state that when a district court takes "possession of property for purposes of *disposition* and *control*" and the property "does not belong to any litigant," the court then acquires "ancillary jurisdiction to hear and to determine all questions respecting *title, possession* and *control* of that prop-

erty." *That is not this case at all.* Further, respondents cite no authorities.

The District Court did *not* take "possession" of property for "the purposes of disposition or control." It has merely made a discovery disclosure order with protective measures in the main action. It is *not* true that the property, *i.e.*, the trade secret, is involved in the main action. Respondents have repeatedly conceded this. *There is no issue of title, possession, control or interest in the trade secret involved in the main action.* Further, it is not true that the trade secret, if it was "property" in any relevant sense, did not belong to any litigant. *Hartley has substantial right, title and interest therein as a licensee and was required to use it in anticipatable litigation resulting from its use thereof.*

Conclusion.

The simple status of the case is as follows:

The *sole* issue in 17741 was whether an appealable order was involved. It was *not* and the Court of Appeals so held in 318 F. 2d 485. The *sole* issue in 17799 was whether du Pont had shown "good cause" for the disclosure, as specified in 287 F. 2d 324. This issue was solely determinable by the record before the District Court. Since respondents' rights to intervene are conceded by them to be dependent only upon a final disclosure order, a final determination of 17799 is a condition precedent to intervention in any event and to the determination of 18180. The *sole* issue in 18180 was whether the respondents *properly* intervened within the leave granted them by the District Court's order of July 31, 1961. There was no question of *the right to intervene*, since this had been determined in 275 F. 2d 52. *Thereafter* the District Court *granted leave to intervene* but it *defined the scope of this intervention* by its order of July 31, 1961 (the oral order followed by written order as of same date signed September 11,

filed September 21, 1961). That order became and is final. As noted, respondents elected to accept that leave and are bound by it.

Respondents have not denied or contradicted the petition. On the contrary, the substance of their contentions shows the urgent need for this Court's review of this case.

For the grounds and reasons stated in the petition, Hartley urgently prays that its petition be granted.

Dated: November 1, 1963.

Respectfully submitted,

OWEN A. BARTLETT and
A. V. FALCONE,
By A. V. FALCONE,
Attorneys for Petitioner
Hartley Pen Company.